RSA 74/2001
BEFORE
THE HON'BLE MR. JUSTICE B.P. KATAKEY

JUDGMENT & ORDER (Oral)

This appeal by the legal heirs of the original plaintiff is directed against the judgment and decree dated 31st May, 2000 passed by the learned Civil Judge (Senior Division), Goalpara in Title Appeal No.1/2000, whereby and whereunder the appeal preferred by the legal heirs of the defendant No.1 has been allowed by setting aside the judgment and decree dated 15th November, 1999 passed by the learned Civil Judge (Junior Division), No.1, Goalpara in Title Suit No.46/1995.

[2] The predecessor-in-interest of the present appellants instituted the aforesaid suit in the Court of the learned Civil Judge (Junior Division), No.1, Goalpara (now Munsiff) praying for declaration of right, title and interest by way of adverse possession and conformation of possession contending inter-alia that Ali Mahmud, the father in-law of the original plaintiff, had the Touzi land measuring 6 Bighas 0 Katha 10 Lechas, which was gifted to his son Bahar Sheikh accompanied by delivery of possession and after the death of Bahar Sheikh, the plaintiff being the widow, has inherited the said property and continued to be in possession. It has also been contended that the husband of the plaintiff and thereafter, the original plaintiff possessing the said land for about 30(thirty) years and in the year 1962, the defendant No.1 mutated her name and trying to dispossess the plaintiff from the land for which the suit, as aforesaid has been instituted. In the said suit, apart from the defendant No.1, the State of Assam as well as the Assistant Settlement Officer by names, were arrayed as the defendant Nos.2 and 3.

[3] The said suit was contested only by the defendant No.1 by filing written statement contending inter-alia that the suit land was gifted by Ali Mahmud in favour of the mother of the defendant No.1, who is the mother-in-law of the original plaintiff, and thereafter, the defendant No.1 continued to be in possession of the land. The claim of gift by Ali Mahmud in favour of the original plaintiff's husband as well as the possession has been denied by the defendant No.1

[4] The suit proceeded ex-parte against the other defendants, as they have not contested the suit despite service of summons.

[5] The Trial Court on the basis of the pleadings framed the following issues for determination:-

(1) Whether there is any cause of action to the suit?

(2) Whether the plaintiff has right, title and interest over the suit land by adverse possession?

(3) Whether the plaintiff is entitled to get any relief?

(4) To what relief if any, the plaintiff is entitled to?

[6] The plaintiff examined 5(five) witnesses in support of her claim. The defendant No.1 examined 3(three) witnesses in support of the pleadings in the written statement.

[7] The Trial Court on the basis of the evidences adduced by the parties, partly decreed the suit of the plaintiff declaring the possession in respect of 4 Bighas 4 Kathas 2 Lechas of land covered by Dag Nos.154, 155 and 156 of village Dakaidal under Revenue Circle-Matia alongwith the proportionate cost.

[8] During pendency of the suit, the original defendant No.1 died and in his place the present respondent Nos.1 to 6 were substituted, who have filed the aforesaid appeal before the first Appellate Court, which has been allowed by setting aside the judgment and decree passed by the Trial Court. Hence, the present appeal.

[9] The appeal was admitted for hearing vide order dated 13th January, 2004 on the following substantial questions of law:-

1. Whether the learned lower appellate court erred in reversing the judgment and decree of the learned trial court by leaving out of consideration of material pieces of evidence including the evidence of Lat Mondal PW-3 with regard to the possession of the appellant?

2. Whether the impugned judgment and order is vitiated by non compliance of Order 41 Rule 31 CPC?

[10] During pendency of the appeal, the original plaintiff died and in her place the present appellant Nos.1(a) to 1(g) were substituted being the legal heirs.

[11] I have heard Mr. S. Sarma, learned counsel for the appellant. None appears for the defendants, though the names of the learned counsel appearing for them are reflected in the cause list.

[12] It has been contended by the learned counsel for the appellants that the first Appellate Court while setting aside the judgment and decree passed by the Trial Court did not discuss the evidences on record, except the depositions of PW-1 and DW-1 and 3(three) documents being Exhibit-A, B and C. It has also been submitted that since the first Appellate Court is the final Court on fact and law, it is required to discuss all the evidences on record, more so when the judgment and decree passed by the Trial Court is interfered with. Mr. Sarma submits that since the suit was for declaration of right, title and interest by way of adverse possession, which was precisely the issue No.2 framed by the learned Court below, the first Appellate Court was duty bound to consider the question of possession on the basis of the evidences adduced, which having not been done, it is a fit case where the appeal may be remitted to the first Appellate Court for decision afresh on the basis of the evidences on record by setting aside the judgment and decree passed by the first Appellate Court.

[13] I have considered the submissions advanced by the learned counsel appearing for the appellants.

[14] It appears from the pleadings in the plaint that the original plaintiff claimed that his father was in possession of some Touzi land, which he used to possess as the khas land. According to the plaintiff, the said land was gifted to her husband, who is the son of Ali Mahmud by a registered deed dated 19th May, 1975 and since then they have been possessing the suit land. The plaintiff, however, based on the said gift did not claim the right, title and interest over the suit land and the said gift deed has also not been proved. The State of Assam as well as the Assistant Settlement Officer by name have been arrayed as the defendant Nos.2 and 3 on the ground that the defendant No.1 has filed an application for ascertainment of the boundary as well as the survey, as pleaded in paragraph 7 of the plaint.

[15] The plaintiff, as noticed, has claimed that the land was gifted

to her husband, who is son of Ali Mahmud, by her father-in-law by a registered instrument, which, however, has not been proved by the plaintiff. In the absence of the same, the property left behind by Ali Mahmud would jointly be inherited by all his heirs, which includes the plaintiff's husband and the original defendant No.1, they being brother and sister. The possession of one co-sharer being the possession on behalf of all other co-sharer, there cannot be claim of adverse possession by the plaintiff, who inherited the share of her husband in the joint family property, against the original defendant No.1.

[16] Even assuming the suit land is Government land, the plaintiff having claimed that her husband came to possess the land after execution of gift deed dated 19th May, 1975, she cannot get a decree declaring right, title and interest by way of adverse possession as against the Government before expiry of 30 (thirty) years, the suit having been instituted in the year 1995. The plaintiff in fact has not claimed such right in the suit.

[17] The Trial Court, therefore, ought not to have passed any decree in favour of the plaintiff by declaring possession in respect of the Government land.

[18] In view of the above, the first Appellate Court has not committed any illegality in setting aside the judgment and decree passed by the Trial Court, however, for reasons recorded above and not for the reasons as recorded by the first Appellate Court in the judgment. The dismissal of the suit, however, would not give any right to the defendants/ respondents to evict the appellants from the suit land, if they are in possession, unless of course, they are evicted by the competent Courts/ authority by following the due process of law. It would also not preclude the appellants from instituting the suit against the State of Assam claiming right, title and interest by way of adverse possession, subject to fulfillment of the conditions, provided the suit land is Government land.

[19] The appeal accordingly stands dismissed with the aforesaid observation.

[20] Registry is directed to send down the records forthwith.